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Supreme Court of the United States

October Term, 1967

No. 1190

FRANKLIN S. KINCHELOE, JR., M.D.,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioner, FRANKLIN S. KINCHELOE, JR., M.D., by his counsel, prays that a writ of certiorari be issued to review the decision of the Supreme Court of the State of North Carolina, which decision reversed the judgment of the Superior Court of Wake County, North Carolina.

The opinion of the Court below was filed November 29, 1967 and final judgment was entered on the same day. (See certificate of Clerk dated December 12, 1967) Case reported in 272 N. C., p. 116.

A Petition for Extension of Time to file this Petition for a Writ of Certiorari was timely filed and petitioner was granted an extension of time for filing said petition to and including March 2, 1968.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the terms and provisions of 28 U.S.C.A., Section 1257, Subdivision 3, and the petitioner's constitutional safeguards reflected in the Amendments to the United States Constitution have been violated resulting in the deprivation of property without due process of law and the denial of procedural due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V. "No person shall be * * * deprived of * * * property without due process of law."

QUESTIONS PRESENTED

1. DID THE COURT BELOW SANCTION A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION AS MENTIONED IN RULE 19-1(b) OF THE RULES OF THIS COURT?

II. DID THE ACTION OF THE COURT BELOW CONSTITUTE A LACK OF "DUE PROCESS" IN DEPRIVING PETITIONER OF A FAIR HEARING?

III. IS THE LACK OF A FAIR AND IMPARTIAL HEARING SUFFICIENT GROUNDS FOR REVERSING THE DECISION OF THE LOWER COURT?

IV. SHOULD EVIDENCE WHICH IS INADMISSIBLE UNDER §90-14.6 OF THE GENERAL STATUTES OF NORTH CAROLINA BE PROPERLY USED AS A BASIS BY THE BOARD OF MEDIGAL EXAMINERS OF THE STATE OF NORTH CAROLINA FOR DETERMINING THE GUILT OF A PHYSICIAN OF UNPROFESSIONAL AND DISHONORABLE CONDUCT AND TO JUSTIFY THE REVOCATION OF HIS LICENSE?

V. DID THE CROSS EXAMINATION OF PETITIONER BY A FAR GREATER NUMBER OF PERSONS THAN PERMISSIBLE UNDER THE SUPERIOR COURT RULES OF PRACTICE CONSTITUTE ACTION THAT WAS CONTRARY TO DUE PROCESS OF LAW?

Rule 4 of the Superior Court of North Carolina provides:

"When several are employed on the same side, the examination or cross examination

of each witness shall be conducted by one counsel."

At the hearing petitioner was questioned by seven persons besides the attorney for the Board and no one was present to see that he received a fair and impartial hearing. This procedure violated ¶90-14.6 of the General Statutes of North Carolina requiring the Board to "admit and hear evidence in the same manner and form as prescribed by law for civil actions" for cross-examination to be performed, as was done here, contrary to Statute, was prejudicial to petitioner and requires the Court to set aside the decision of the Board for the lack of a fair and impartial hearing, since the hearing upon which the decision to revoke petitioner's license was based was conducted contrary to ¶90-14.6 of the General Statutes of North Carolina.

VI. DOES THE LOSS OF A VALUABLE PROPERTY RIGHT BECAUSE OF THE LACK OF "DUE PROCESS" PROTECTION AUTHORIZED BY THE FEDERAL AND NORTH CAROLINA STATE CONSTITUTIONS REQUIRE REVERSAL HERE?

The right to practice medicine is a valuable property right (*Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 592) which should not be denied in a manner or for reasons which contravene the due process protection clause of the Fourteenth Amendment to the United States Constitution.

Article I, Section 17, of the North Carolina Constitution, prescribes that "no person * * * ought to be in any manner deprived of his property, but by the law of the land. The term "law of the land" is synonymous with "due process of law", which phrase appears in the Federal Constitution. *Surety Corp. v. Sharpe*, 232 N. C. 98, 103, 59 S.E. 2d 593.

From the manner in which the proceeding below was conducted as shown by the entire record it is clear that petitioner did not have a fair and impartial hearing.

ARGUMENT

PETITIONER'S RIGHT TO BE REPRESENTED BY COUNSEL AND HIS RIGHT TO CONFRONT WITNESSES WAS NOT KNOWINGLY AND INTELLIGENTLY WAIVED BY HIM

The record shows that several members of the Board asked questions concerning his previous trial by the Board which occurred some 3-1/2 years earlier.

It is urged that this evidence was extremely prejudicial and should not have been considered by the Board in this proceeding.

Upon appeal there was a decision by Judge Lacey M. Thornburg of the Superior Court of Wake County on September 17, 1967 in which he found (page 11 of typewritten transcript) that petitioner did not receive a fair and impartial hearing by the Board, that incompetent evidence outside the scope of his notice was heard and most probably considered by the Board in reaching its decision; and the Board did not comply with the mandatory provisions of GS 90-14.6. From these findings and rulings the Board appealed. Both parties filed exceptions.

The finding of the Board of Medical Examiners of the State of North Carolina that Franklin S. Kincheloe, Jr., M.D., had been guilty of unprofessional and dishonorable conduct unworthy and affecting his profession was unsupported by competent evidence.

Dr. Kincheloe's right to be represented by counsel at the Board hearing was not waived by him.

The right to be confronted by witnesses at the hearing before the Board was not waived.

There was insufficient competent evidence to justify the finding that Dr. Kincheloe's license to practice medicine in North Carolina should be revoked.

In a hearing held by the Board on January 6, 1967, two months and five days after he was served, Dr. Kincheloe was not represented by counsel. He was asked if he had counsel (R. 3) and he said in answer to the question, "I do not feel it is necessary. No;" and upon being handed a copy of the charges he asked to be excused from hearing the testimony of the witnesses concerning them. He declined to cross examine witnesses (R. 30).

Throughout that portion of the hearing seven witnesses were heard against the interests of Dr. Kincheloe. Examination of such was very limited in extent and nature and little effort was made by members of the Board or its attorney to test the credibility of the evidence offered (R. 30) (Tr. 60-68). At this hearing Dr. Kincheloe testified in his own behalf (Tr. 61, *et seq.*). Following his testimony he was subjected to strenuous cross examination by the attorney for the Board, the President and Secretary of the Board and by four other Board members (R. 30-31). No transcript of the foregoing cross examination is contained in the record (R. 30-31).

Reference to a previous appearance before the Board by Dr. Kincheloe concerning revocation of his license at that time was inquired into, but does not appear in the record now before this Court.

In the course of the hearing before the Board numerous references were made to Dr. Kincheloe's confinement and treatment in a state mental institution, although such were not contained in the notice served upon this physician prior to the hearing.

Dr. Kincheloe did not get a fair and impartial hearing before the Board of Medical Examiners of North Carolina and his rights were violated by such Board.

GS 90-14.6 required in proceedings held pursuant to this Article that evidence must be admitted in the same manner and form as prescribed by law for civil actions. The fact that this was not done was sufficient to nullify the decision of the Board.

Petitioner was served with notice of charges and accusations November 1, 1966 (R. 30) when he was a patient in a state mental institution. The Board held a hearing on his case January 6, 1967, approximately two months later. There is no evidence in the record that at the time of the hearing that his mental condition has improved or that it had subsided, and his actions at this hearing leads to the conclusion that he remained mentally ill. In the absence of evidence to the contrary, his mental condition which required hospitalization in a state mental institution can be assumed to have continued until the contrary is shown. This is borne out by his conduct at the hearing when he declined the offer of counsel to represent him and asked to be excused from hearing the testimony of the witnesses concerning him and declined to cross examine the witnesses (R. 30). We may, therefore, properly conclude that Dr. Kincheloe was mentally ill at the time of his hearing on January 6, 1967. For such a helpless person to be required to defend himself constituted reversible error.

It was not proper for the Board to consider matters which occurred over three years ago with respect to the revocation of petitioner's license to practice medicine when they here reach a decision about a recent occurrence.

Petitioner needed counsel to assist him, as will be seen from a study of the record and ordinary fairness requires this Court to take cognizance of this fact.

The Court below erred in holding that its erroneous admission of evidence does not require a reversal of the decision of the Court below. This evidence was prejudicial and the Board's findings based thereon were therefore erroneous.

The brief of Dr. Kincheloe filed in the Supreme Court of North Carolina at page 8 contains the following statement:

> "Beginning on R. p. 79 through R. p. 108, the record shows that 19 times licensee was asked a question and then cut off or prevented from completing his answer."

It is apparent from the record that petitioner sorely needed counsel. He was questioned about matters that were not contained in the notice served upon him. Evidence was admitted contrary to GS 90-14.6 which was not in the same manner and form as prescribed for civil actions. The hearing was required to be held in the same manner as was customary in civil actions, but was not, as the record will show. His answers to questions indicated he needed counsel. This was proved by the inefficient manner in which he conducted his defense. Clearly, Dr. Kincheloe did not receive a fair and impartial hearing before the Board.

His right to be represented by counsel at the Board's hearing and his right to confrontation of witnesses called at the hearing was not knowingly and intelligently waived by petitioner

and his personal appearance before the Board at the meeting held on January 6, 1967 did operate to waive any defect in the notice of this hearing, as was held by the Court below. The Board itself realized that it had committed error because it assigned as error here (Exception No. 2, R. 215) that "no reference was made in the notice to any previous appearance by Dr. Kincheloe before the Board" although reference to his previous appearance before the Board by Dr. Kincheloe concerning the revocation of his license at that time was inquired into in depth at the January 6, 1967 hearing before the Board (R. 125).

The petitioner takes exception to Conclusions of Law numbered 2, 3, 4, 5, 6 and 7. There are as follows:

2. "That any defect in notice of hearing before the Board was waived by Dr. Kincheloe through his personal appearance before the Board at its meeting held on January 6, 1967, at the appointed time and place set forth in the notice of charges and accusations."

3. "That any right to be represented by counsel at the hearing was knowingly and intelligently waived by Dr. Kincheloe."

4. "That any right to confrontation by witnesses called at the hearing before the Board was knowingly and intelligently waived by Dr. Kincheloe."

5. "That the trial and acquittal by Dr. Kincheloe of criminal charges arising out of the incident referred to in the notice of charges and accusations is not res judicata and is not a bar against the proceeding before the Board of Medical Examiners of the State of North Carolina."

6. "That there is sufficient competent evidence in the record to support the findings by the Board that Dr. Kincheloe's license to practice medicine in the State of North Carolina should be revoked."

7. "That there is sufficient finding of fact upon which the Board could base its conclusions that Dr. Kincheloe was guilty of unprofessional and dishonorable conduct."

The following exceptions and assignments of error of the Board of Medical Examiners of the State of North Carolina are also urged upon the Court by petitioner:

Board's Exception No. 7 (R. 127) which stated that Dr. Kincheloe did not receive a fair and impartial hearing by the Board.

Board's Exception No. 8 (R. 129) that the Court include in its conclusion of law the following: "that incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision".

Board's Exception No. 9 (R. 127) that the Court include in its conclusion of law the following: "The Board at its hearing on this matter did not comply with the mandatory provisions of GS 90-14.6".

Board's Exception No. 10 (R. 12) is that the Court ordered remanded to the Board of Medical Examiners for a hearing *de novo*.

Petitioner concurs in the foregoing Exceptions of the Board numbered 7, 8, 9 and 10 and recommends that the Court approve them.

On November 1, 1966, Dr. Franklin S. Kincheloe, Jr., hereinafter called petitioner, was served with notice from the Board of Medical Examiners of the State of North Carolina that certain charges and accusations had been made against him and that a hearing on these charges which related to the alleged mistreatment of Deborah Edwards, now Deborah Edwards Stanley, on August 17, 1966, would be held on January 6, 1967. At said hearing the Board of Medical Examiners of the State of North Carolina found petitioner guilty of unprofessional and dishonorable conduct and ordered that his license to practice medicine be revoked. The Court held that the Board did not comply with GS 90-14.6 which required that in proceedings under this Statute the Board should admit and hear evidence in the same manner and form as prescribed by law for civil actions. The Court indicated that questions regarding the criminal trial of rape against petitioner were improper, but the Court did not so hold. The Court also found that petitioner did not receive a fair and impartial hearing in that "incompetent evidence outside the scope of his notice was heard and most probably considered by the Board". With this, petitioner agrees and urges now that it requires this Court to reverse.

The Board held that petitioner's right to be represented by counsel and his right to confront witnesses was knowingly and intelligently waived. But the record does not justify such a waiver. He told the Court that he had expected the Board to take the transcript of his trial in the Superior Court "as these witnesses had been cross-examined and then I felt they would take all this information available to them in the court proceedings".

He said he did not take a lawyer with him to the Board's proceedings because he could not afford the services of a lawyer and did not have any money from any source with which he could have employed an attorney; he had never cross examined any witnesses and was not experienced in questioning witnesses or otherwise defending himself in this proceeding before the Board. He had requested that he not be present when the witnesses testified and that he be excused from this proceeding. This indicated an inability on the part of petitioner to properly appraise the situation as he should have.

The Court of Appeals held that the evidence was sufficient to sustain the findings of the Board and the facts found support its order revoking Dr. Kincheloe's license. The order against the Board was reversed and the case referred to the Superior Court of Wake County for judgment revoking petitioner's license.

CONCLUSION

In view of the foregoing the Court is urged to reverse the decision of the Court below for the reasons hereinbefore stated.

Respectfully submitted,

WARREN E. MILLER
810 - 18th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

APPENDIX

IN THE MATTER OF:	)	
FRANKLIN S. KINCHELOE, JR.,	)	
M.D.,'s APPLICATION FOR	)	
REVIEW OF ORDER OF BOARD	)	No. 540 – Wake
OF MEDICAL EXAMINERS OF	)	
THE STATE OF NORTH CAROLINA	)	

Comes now by and through his Attorney, Franklin S. Kincheloe, M.D., and moves the Honorable Court to Stay the mandate on the Judgment entered by the Supreme Court of North Carolina on November 29, 1967, affirming the revocation movant's license to practice medicine in the State of North Carolina.

Movant seeks this Stay in order to afford time within which to file a petition for Writ of Certiorari in the Supreme Court of the United States.

In support of this application and motion, movant urges that the revocation of his license to practice medicine in the State of North Carolina was in violation of his Constitutional Rights; that it deprives him of property without due process of law.

Movant further represents that on account of revocation to practice is arbitrary, capricious without good cause and legal justice.

Movant sincerely represents this motion to Stay filed in good faith and not for the purpose of delay.

/s/ Franklin S. Kincheloe, M.D.

By: /s/ Edward Gibbon Hobbs, Sr.
Attorney for Applicant

[Certificate of Service]

Movant relies upon Amendment V (Due Process) of the Constitution of the United States to support his motion, and upon the fact he was acquitted by an Honorable Jury of Impartial Jurors in the Superior Court of Johnston County on the same evidence used by the North Carolina Medical Board revoking applicant's license to practice medicine in North Carolina (see criminal case 12,680, State vs Frank S. Kincheloe, Jr., M.D.) and upon the applicable rules of the Supreme Court of the United States providing for review of Judgments of the highest Court of the States when serious Constitutional questions are involved.

Respectfully submitted, this the 27th day of December, 1967.

/s/ Edward Gibbon Hobbs, Sr.
Attorney for Franklin S.
Kincheloe, Jr., M.D.
Box 501
Selma, North Carolina

ORDER TO STAY EXECUTION OF THE JUDGMENT

This cause coming on to be heard before The Honorable R. Hunt Parker, Chief Justice of the Supreme Court of North Carolina, upon the motion filed by movant, Franklin S. Kincheloe, Jr., M.D., for a stay of execution of judgment rendered by the Supreme Court in the above-entitled cause on the 29th day of November, 1967, and the Court being of the opinion for good cause shown, the motion should be granted.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED and DECREED that the execution of the judgment or order be and the same is stayed pending final determination of the Petition for writ of certiorari to be filed by the movant, Franklin S. Kincheloe, Jr., M.D., with the Supreme Court of the United States; provided said Petition is filed within the time required by Rule 22 of the Supreme Court of the United States;

IT IS FURTHER ORDERED that this stay remain in effect until its writ of certiorari is denied by said Court or affirmed by said Court.

IT IS FURTHER ORDERED that mandate on said judgment be and is hereby stayed to and including the 27th day of February, 1968.

IT IS FURTHER PROVIDED that movant shall abide by the judgments or orders of this Court and of the Superior Court of Wake County if the Application of the movant to the Supreme Court of the United States for writ of certiorari be denied or if such application be granted and the determination of that Court, upon the hearing of the matter, be that the decision of the Supreme Court of North Carolina set forth

in the opinion of this Court issued on the 29th day of November, 1967 is affirmed or otherwise upheld.

This 27th day of December, 1967.

/s/ R. Hunt Parker, Chief Justice of the Supreme Court of North Carolina

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2nd, 1968.

/s/ Earl Warren
Chief Justice of the United States

Dated this 20th day of February, 1968.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing petition, postage prepaid, to J. H. Anderson, Attorney for the Board of Medical Examiners for the State of North Carolina this 2nd day of March, 1968.

WARREN E. MILLER

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1196

FRANKLIN S. KINCHELOE, JR., M.D.,

Petitioner,

v.

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Respondent.

APPENDIX

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APPENDIX

IN THE SUPREME COURT OF NORTH CAROLINA

FALL TERM 1967

IN THE MATTER OF:	)	
FRANKLIN S. KINCHELOE, JR., M.D.,'S	)	
APPLICATION FOR REVIEW OF ORDER	)	No. 540 – Wake
OF BOARD OF MEDICAL EXAMINERS	)	
OF THE STATE OF NORTH CAROLINA	)	

Appeal by Board of Medical Examiners of North Carolina and Licensee Franklin S. Kincheloe, Jr., M.D., from THORNBURG, S.J., September 1967 Session, Wake County Superior Court.

On 1 November 1966 Dr. Kincheloe was served with notice from the Board of Medical Examiners of the State of North Carolina that certain charges and accusations were made against him and that a hearing on them would be held on 6 January 1967. The charges related to his alleged mistreatment of Deborah Edwards (Stanley), the respondent's patient, on 17 August 1966. In detail, they alleged that he caused Miss Edwards to remove all of her clothing without any medical reason or necessity, examined various parts of her nude body while no other person was present, administered a hypodermic which rendered her unconcious; and while in that condition he acted in an unprofessional

capacity and engaged in sexual intercourse with her. The notice also stated that the respondent's conduct was unprofessional and dishonorable and constituted grounds for the revocation of his license to practice medicine.

As a result of the 6 January hearing, the Board found Dr. Kincheloe guilty of unprofessional and dishonorable conduct and ordered that his license to practice medicine be revoked.

The respondent appealed to the Superior Court of Wake County, and thereafter the Court stayed the revocation of his license pending a hearing and remanded the cause to the Board of Medical Examiners for further findings and order. After several interlocutory motions and orders, the cause came again to the Superior Court upon the respondent's appeal and was heard before Hon. Lacy H. Thornburg, Judge Presiding in Wake County on 20 September 1967.

The stenographic record of the evidence presented before the Board was included in the respondent's case on appeal and was given consideration by the Court. The respondent was also permitted to testify orally before the Court.

Summarized, except where quoted, the evidence against the respondent before the Board of Medical Examiners tended to show that on 16 August 1966 Mrs. Myrtle Edwards took her sixteen-year-old daughter Deborah Jean Edwards to Dr. Kincheloe's office for an examination and attention. After an hour or so he took Deborah and her mother into his private office where the mother told the doctor that Deborah had been feeling bad, that she though her kidneys were bad and that she wanted the doctor to check them. Deborah had been struck by the mirror of a truck the day before and had been suffering from a headache since then.

Dr. Kincheloe took Deborah into another room, leaving her mother in his office. He kept her there from about 3:30 p.m. until after 5:00 p.m. When Deborah came out she was holding onto the wall, steadying herself, staggering and was dizzy. Mrs. Edwards and Deborah then went to the home of another daughter, and later Deborah told two older sisters what had occurred while she was with Dr. Kincheloe. The sisters told the mother, and the next morning Deborah was examined by Dr. Leonard S. Woodall who testified that he made a pelvic examination to see if Deborah had had intercourse; that he found sperm and a laceration of the hymenal, and that in his opinion she had had intercourse.

Deborah testified that she had been hit by the mirror of a truck and received a blow on her right temple; that she had some bad headaches that night and the next day, and also that she had been in bed sick for about a week and "mother thought it was my kidneys." Upon being admitted to Dr. Kincheloe's private office, Mrs. Edwards told him that she wanted him to examine Deborah's head because the truck had hit her and to check her kidneys. The child was then taken to another room, and Dr. Kincheloe asked her to go into the bathroom and give him a specimen of her urine, which she did. The doctor told her to put it on the table, and it was still in the same place when she left the room over an hour later.

She then testified as to what further occurred, except for a period of unconsciousness caused by the injection of some drug in her arm. No good purpose would be served by relating the details of the hour-long treatment during which no nurse or other person was present.

She said she was required to completely disrobe, and after a more than complete examination was given an injection that rendered her unconscious. Her evidence offered a substantial base for the findings of the Board which were affirmed by the Court.

She was dizzy and had to hold onto the wall or chair to keep from falling as she left the office. When she got to her sister's house she told her mother that the doctor had given her a shot and she passed out and I was real dizzy and sleepy like I could sleep for three or four days. I was scared you know when I woke up I was real sore and it hurt me when I walked . . . but I was scared to say anything about it so I didn't mention it." The next day she told her sister Virginia about it, and Virginia told another sister, Becky. About an hour later the two sisters came over to Deborah's house, "and I told her about what I thought had happened and then Becky went and told mother she thought I ought to go to the hospital and be examined. . . . I was sore in my lower private parts and it hurt me to sit down. As soon as I awoke I was hurting, and sore but I didn't say anything about it to anybody. . . . I was sore all the next day. . . . There was some bleeding from my body that night when I came home. . . . I discovered a small amount in my pants and a lot of discharge."

Deborah testified that she had not engaged in sexual intercourse before the incident in Dr. Kincheloe's office.

Mrs. Rebecca Edwards Wheeler corroborated the testimony of her young sister Deborah, saying that after the other sister Virginia told her about talking with Deborah that she then questioned Deborah, who recounted the details of the

experience with Dr. Kincheloe. Her testimony fully corroborated Deborah's testimony.

Mr. Robert D. Emerson, Special Agent of the State Bureau of Investigation, said that after his department had been called into the case, he interviewed Mrs. Myrtle Edwards and Deborah Jean Edwards, and that at the time of the interviews, E. L. Norton, another agent of the S.B.I., and a lady were present. In essence, he said that the statements made to him by Mrs. Edwards and her daughter were the same as contained in her testimony before the Board. He also said that he had investigated the reputations of Mrs. Edwards and Deborah and that they were good.

When the Board began its hearing on 6 January 1967, Dr. Kincheloe was present but was not represented by counsel. Before going into the hearing he was asked if he had counsel and replied that he did not and said he didn't feel it was necessary. Previously, the respondent had indicated that he did not wish to remain in the room during the testimony of witnesses, and he was then given an opportunity to make a statement regarding that subject. He then said:

> "Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I frankly do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented

their story and my version of what actually happened has not been told.

"DR. DAVIS: Well, if it is your preference, then we will excuse you from this part of the proceedings.

"DR. KINCHELOE: Thank you very much.

"(Dr. Kincheloe is excused)"

During the examination of the witnesses, an attempt was made to locate Dr. Kincheloe, but he was not to be found in the building. Later he returned to the hearing room and was asked if he cared to examine any or all of the witnesses, to which he replied: "No sir, this has been done in court previously, and I am not an attorney. I don't feel qualified to cross examine the witnesses. . . . I would like simply to present my story telling you exactly what happened." He was then sworn and said:

"Gentlemen, I would like to have the privilege of telling my story without interruption if it is all right with you, and if you have any questions when I finish, feel free to ask them. Let me preface my remarks by saying that some three and a half years ago I was before this Board, at which time I was guilty of something I am quite deeply ashamed of, I was certainly in the wrong and the decision of this Board to revoke my license at that time I feel was entirely justified; I certainly bear no ill feeling against this Board. And had I been on the Board at the time myself I feel that my decision in that particular case would have been the same as yours, you had no choice but to do what you did at that time."

He then said that he was a changed man and was incapable of doing what he was charged with; that when Mrs. Edwards brought her daughter to his office, she said she wanted him to give Deborah a complete examination, and he thought perhaps the mother suspected that her daughter was pregnant and assumed she wanted a pelvic examination. He testified he examiner her urine while Deborah was getting undressed; that he did not watch her undress; that when he went back to the examining room "Deborah Jean was sitting on the edge of the table with the sheet pulled up over her . . . she did not wear a slip to the office that day, and so underneath she had nothing on, ... I had her lie down and pulled out the extension to the table . . . I did a routine examination of her chest while she was in the supine position, I had no nurse present but the door was open – the door was not locked certainly, to this office, the mother had indicated that she did not care to come back there with the daughter . . . she had free access to come in at any time and I felt that with the mother present there it was certainly not unethical to examine the girl when all the girl had to do if she wanted her mother was to ask for her and the girl certainly did not ask for her mother . . . I did not watch her undress . . . I did nothing to embarrass the girl, the entire course of the examination was routine and entirely ethical." He said he did not give her a shot in the arm which put her to sleep; that he did give her a shot of penicillin in the hip and had her roll slightly on the table, "the sheet was over her during this entire course of the examination except of course those parts that were being examined, and everything was done in a strictly doctor-patient relationship. . . . I certainly did not tell her that she was pretty, that she looked like a movie star . . . made no attempt to kiss her. . . . I gave her the

shot of penicillin in her hip and I put her feet in stirrups and did a routine pelvic examination of her. I asked her at the time if I was hurting her in any way and she said no. There was no indication, I did not notice any break in the mucosa . . . She had a marital outlet, I had no difficulty in examining her. . . . [W]hen I finished doing the pelvic I turned around and went into the bathroom . . ., told Deborah Jean to get her clothes on and while I was washing the glove and the speculum . . . her mother knocked at the door . . . I opened the door, her mother came in, Deborah Jean was standing there, she was already dressed . . ."

He said he then did a hemoglobin, told the mother that he had found nothing wrong other than a mild sore throat and gave Deborah some B vitamin. He said the girl was in his office not over forty to forty-five minutes, during which time he was interrupted by at least three or four telephone calls; that he made no advances; that he was forty-five years of age and wouldn't think of doing anything like this in his office.

He also said that his lawyer had checked into Deborah's character; that she was "certainly not virginal and I have heard of other boys that she's been out with but there are three that I definitely know of that told me they had been out with her and had intercourse with her . . ."

Following his statement, several members of the Board, as well as Mr. Anderson, the attorney for the Board, asked him questions. No new evidence was developed, and the questions were not of a harsh nature but constituted a repetition of his previous evidence. He said, "[It] was quite obvious when I put her up for a pelvic examination, that she was not virginal." He discovered no laceration and saw no indication of

pregnancy. He further said that Deborah did not resent having to take her clothes off, did not ask for her mother to be present; that he closed the door because it is not good policy to examine any female patient with the door open where someone can come in unexpectedly. Mr. Anderson then said, "I will not ask you at this time about your last appearance, the Board can ask you about that . . . [Answer] Well, as I said, gentlemen, I have a deep sense of guilt about that appearance, as I told you I was in the wrong, I know I was in the wrong and I feel that what you did in that instance was completely justified, you had no other recourse than to do what you did."

In response to a question that didn't he think it was necessary to have another female present at the time of the examination, he said he wanted another female in the immediate vicinity where they can come in but did not require her to remain during the entire course of the examination; that if he had known the examination was going to involve the time it did or if he had known that she wanted a complete examination he would not have taken her back there.

The record shows that several members of the Board asked the respondent concerning his previous trial by the Board, and he repeatedly said that the Board did the right thing; that he had no criticism of it, that he would have done the same thing had he been a member of the Board and admitted that he had not been truthful in regard to the previous charge.

He was then asked about his attempted suicide following the present charge and his treatment at Dorothea Dix Hospital where he stayed for twenty days after the charge was filed against him. He replied that when he was charged with

raping Deborah, his wife had said "that she was going to leave me, she was fed up with all this, that she was through with me, and I was depressed enough to think she meant it . . . I filled myself just as full of phenobarbital as I could . . . . More than a lethal dose. . . . This is the first time I've ever attempted suicide and it will certainly be the last time."

He said he had a gun in his pocket when he was taken to the State Hospital, and "I debated and couldn't decide whether to shoot myself, I decided that would be too messy."

George Eason testified for the defendant that he and several other patients were in Dr. Kincheloe's office the day Deborah and her mother came there; that the latter were taken ahead of him; that they were "back there I don't know, forty to forty-five minutes . . . I heard the phone ring several times . . . The girl and her mother looked well when they left the office, seemed to be all right." Upon cross examination, the witness admitted that he had served time in several places for breaking and entering, fighting, and intoxicants.

At the conclusion of the evidence before the Board, the respondent expressed the hope that his testimony had been heard with an open mind and said, "I can only re-emphasize that I am not the same person that I was at the time I was here before this Board before, and this thing that has happened to me recently I am not guilty of, any facet of it."

On 10 January 1967, by unanimous vote, the Board found and concluded "that Franklin S. Kincheloe, Jr., M.D., in connection with his treatment of Deborah Jean Edwards on August 17th, 1966, was and is guilty of unprofessional and dishonorable conduct unworthy of, and affecting, the

practice of his profession, and that grounds exist for the revocation of his license to practice medicine, and ordered that the license of said Franklin S. Kincheloe, Jr., M.D., to practice medicine in the State of North Carolina be revoked."

The respondent gave notice of appeal to the Superior Court and obtained a stay of the revocation of his license. At the April 1967 Session of Wake County Superior Court, the respondent moved that the Board of Medical Examiners "be required to dispose of the charges contained in paragraph No. 1 . . . or to pass upon the same before any hearing upon this notice of appeal." The Court allowed this motion and remanded the cause "to the Board of Medical Examiners . . . for disposition of the charges contained in paragraph 1 of the Charges and Accusations as shown in the record."

On 12 June 1967, the Board reviewed the testimony, considered and discussed each of the charges and accusations and then found (1) that the respondent "in connection with his treatment of Deborah Jean Edwards as a patient directed and caused her to enter a room in the rear of his office, excluded her mother from the room, and entered the room and closed the door"; (2) that he "then directed and caused her to remove all her clothing in his presence without any medical reason or necessity"; (3) that he "examined the various parts of the nude body . . . in a room, the door or doors to which were closed, and in which no other person was present"; (4) that he "administered to [her] a drug by hypodermic injection which rendered her unconscious for an appreciable period of time without any medical reason or necessity"; (5) that "while [she] was unconscious and insensible to her surroundings and while no other person was present and

while she was unclothed, examined, observed, touched, and otherwise came in contact with her body, all without medical reason or necessity"; (6) that he "attempted to kiss [her]"; (7) that he "placed his arm around [her] while she was unclothed, without any medical cause or necessity"; (8) that he "penetrated the vaginal cavity which caused a laceration at the entrance to the vagina . . . without medical reason or necessity, and without the presence of any other person"; (9) that "by his remarks and actions in his dealings and attendance of [her], displayed a lustful, lascivious, and unprofessional attitude and demanor, and he did take unprofessional liberties with her"; (10) that "in connection with his treatment of Deborah Jean Edwards as a patient engaged in sexual intercourse with [her]"; (11) that he "was guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession and that grounds exist for the revocation of his license to practice medicine . . ."

Following these findings, the order concluded:

> "Upon motion duly made, and seconded and unanimously adopted the Board ordered that the Order of the Board of January 10th, 1967, revoking the license of Franklin S. Kincheloe, Jr., M.D. to practice medicine in the State of North Carolina be reaffirmed and reiterated, and that his license to practice medicine be revoked."

This order was signed by Jos. J. Combs, M.D., Secretary of the Board, and the following day an order was signed by James E. Davis, M.D., President of the Board, confirming the findings of the previous day and ordered revocation of the respondent's license.

The respondent filed numerous exceptions to the foregoing orders, and the matter was heard on appeal before Judge Lacy H. Thornburg, Judge Presiding in the Superior Court of Wake County, in September 1967.

At the hearing before Judge Thornburg, the respondent was permitted to make a statement in which he said that he had expected the Board to take the transcript of his trial in the Superior Court "as these witnesses had been cross examined and then I felt they would take all this information available to them in the court proceedings." He further said that he did not take a lawyer with him to the Southern Pines hearing before the Board because he could not afford the services of a lawyer and did not have any money from any source with which he could have employed an attorney; that he had never cross examined any witnesses; that he had requested that he not be present when the witnesses testified; that he be excused from this proceeding; that their testimony had been presented in the trial and he assumed they would go by that transcript.

Upon cross examination, the respondent said that he had received notice of the charges against him in October 1966 and had read them and understood them; that he was not under any mental disability then or at the time of the Board hearing; that he knew he would be permitted to appear in person or be represented by counsel; that he was asked to stay and hear the witnesses and declined to do so. He further said that he had employed lawyers in connection with the charges against him two or three times; that he voluntarily surrendered his narcotics license in 1952; that he employed counsel in connection with the charges profferred against him by the Board in 1963; that he had counsel at that hearing

and two lawyers on appeal to the Superior Court and that one of them was the attorney now representing him.

Judge Thornburg in a complete order found the essential facts and made rulings of law. In summary, he found that the Board had authority to revoke Dr. Kincheloe's license; that there was no defect in the notice to him; that his right to be represented by counsel was knowingly and intelligently waived as was the right to confront witnesses; that his trial and acquittal of criminal charges was not *res judicata* nor a bar against the proceedings before the Board; that there was sufficient competent evidence to support revocation of his license and its conclusions that he was guilty of unprofessional and dishonorable conduct. (It was from these findings and rulings that the respondent appealed.) The Court then held that he did not receive a fair and impartial hearing by the Board; "[t]hat incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision"; and that the Board did not comply with the mandatory provisions of G.S. 90-14.6. (From these findings and rulings, the Board appealed.) The Court then remanded the case for hearing *de novo* before the Board and stayed the order of revocation pending further proceedings.

Both parties filed exceptions, which are discussed in the opinion.

ALBERT A. CORBETT, Attorney for Franklin S. Kincheloe, Jr., M.D.

SMITH, LEACH, ANDERSON & DORSETT by John H. Anderson, Attorneys for The Board of Medical Examiners of the State of North Carolina.

PLESS, J. G.S. 90-14 provides that the Board of Medical Examiners may revoke a physician's license, "when, after due notice and hearing, it shall find [he] . . . has been guilty of . . . any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession . . ." It further provides that its findings and actions shall be subject to review upon appeal to the Superior Court.

G.S. 90-14.10 says that upon the review, the case shall be heard by the judge without a jury, upon the record; that "[t]he court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this article, or are arbitrary or capricious."

G.S. 90-14.11 authorizes any party, including the Board, to appeal to the Supreme Court from the decision of the Superior Court.

The public generally has respect for the learned professions: medical, legal and divinity. If that confidence is to be maintained, it can only be because the ninety-nine per cent of the ethical, honorable members of their professions insist that the one per cent, or less, who violate their responsibilities and duties are promptly shorn of the opportunity to do so. Here, a group of eminent doctors of the very highest character and reputation have (and the record shows they did it reluctantly and regretfully) found their associate guilty, upon impressive evidence, of "lustful, lascivious and unprofessional conduct." The Court found that these findings were supported

by the evidence, as was its order that his license to practice medicine be revoked.

However, the Court also found that Dr. Kincheloe did not receive a fair and impartial hearing in that "incompetent evidence outside the scope of his notice was heard and most probably considered by the Board." The finding does not specify this evidence, but upon consideration of the record, we can only construe it as holding improper the questions by the members of the Board regarding the respondent's previous violations, which had resulted in the suspension of his license. This ruling is fallible. (1) The respondent first interjected this feature when he referred to his hearing before the Board three and a half years earlier and said that he was ashamed of the matters then investigated. The admission of incompetent evidence is cured when substantially the same evidence is theretofore or thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, Sec. 48. Thus, if evidence regarding his previous license revocation were incompetent, it had "theretofore been admitted without objection" in the form of the respondent's voluntary statement. (2) The proceedings show that the previous charges were already known to the members of the Board so that information given in the present investigation added no new knowledge. (3) Examination of a defendant, or respondent, as to past misconduct is competent for the purpose of impeachment and may properly be considered by a jury (or a board) in weighing the value and credibility of his testimony. Stansbury, in his helpful work, N. C. Evidence, Witnesses, Sec. 42, summarizes the law of cross examination with many citations to support the statement:

"Cross-examination may be employed to test a witness's credibility in such an infinite variety of ways that an attempt to list them would be futile. 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony . . . and to show his animus, feeling, or bias.' . . . [C]ross-examination is available to establish such well-recognized grounds of impeachment as bad moral character (including specific instances of misconduct), bias, self-contradiction, etc."

2 Strong, N. C. Index, Evidence, Sec. 58, says:

"The right to cross-examine an opposing witness is a substantial right. The latitude of cross-examination for the purpose of impeachment is wide. A witness may be asked questions on cross-examination which tend to test his accuracy, to show his interest or bias, or impeach his credibility . . . . Questions relating to crime and anti-social conduct are allowed."

The Doctor was questioned about his previous troubles with the Board, as well as other questionable activities, only after he had referred to them, or it was apparent from the questions that the members of the Board already had knowledge of these activities, and no new material information was thus elicited. While no objection was taken at the time, all of the questions asked were competent and would have been admitted by any court.

In its judgment, the Court found that the prosecution of the respondent upon the charge of rape which resulted in his acquittal was not *res judicata* and was not a bar gainst these proceedings. This was correct, and yet the learned judge implied that questions regarding that trial were improper. We cannot agree. Other factors must be considered. In a criminal trial, the guilt of a defendant must be shown beyond a reasonable doubt; here only a preponderance of the evidence is required. In the criminal charge, the defendant was alleged to have committed rape – here he was charged with unethical and unprofessional conduct in having sexual relations with his patient – a vast difference. In the criminal prosecution, the penalty upon conviction is a death sentence or life imprisonment. In these proceedings the maximum punishment is the loss of the respondent's license to practice medicine.

It is also implied that some disadvantage resulted to the respondent because he was not represented by counsel at the hearing, saying he could not afford to employ counsel. Also, it must be recalled that he said he didn't think this necessary and that he waived it. Even had he not done so, we knew of no provision for the appointment, at public expense, of an attorney for a doctor whose office is so filled with patients that he has to decide whom he will see first. It would strain the credulity of the public to learn that, in these days, there is an indigent doctor!

No material change in the circumstances of the respondent has been shown, but we note that he is now represented by able (and not court-appointed) counsel.

The Court also found that the Board did not comply with G.S. 90-14.6. It is as follows:

> "In proceedings held pursuant to this article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions. A complete record of such evidence shall be made, together with the other proceedings incident to such hearing."

An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank." The only incompetent evidence we find is that the respondent was permitted to violate the hearsay evidence rule and testify to the alleged immoral conduct of Deborah, which he claims was related to him by three different boys.

The respondent admitted he was in the wrong and unfair to the Board in its previous hearing but claims that he did not commit the acts attributed to him here. In the former proceeding, the evidence indicates that the respondent was a deviate, and after the suspension of his license, it has been restored to him with a warning in regard to his future conduct. If he is an uncontrollable deviate, we must all sympathize with him. If he isn't, and his acts here were as the Board found, "lustful and lascivious," the result is the same. In neither event should he be allowed to practice a profession which affords him the frequent opportunity – if not the temptation – to accede to his deviations or his lasciviousness – whichever it is.

In full and complete hearings, of which the respondent had notice, evidence has been submitted to the Board which fully sustains its findings and order as set out in the

statement of facts. No reason appears to question the motives and veracity of Deborah Jean Edwards. If, for any reason, she were making a false charge against the doctor, she could have testified that while in a semi-conscious condition and unable to protect herself, the respondent had sexual relations with her. The fact that she did not so testify but that this was discovered only after she had spoken of her soreness to her sisters, followed by the examination by Dr. Woodall, gives credence to the charges. Upon all of the evidence, including that of the respondent, Deborah was in his office for a sufficient length of time for the incident to occur as found by the Board. Deborah's testimony is corroborated in many details by the testimony of her mother, her sister, Mr. Anderson of the S.B.I., and Dr. Woodall. In opposition to this, we have only the denial of the respondent and rather vague substantiation of part of his statement by the witness Eason.

Upon consideration of all the evidence, we are of the opinion that it was quite sufficient to sustain the findings of the Board and that, as a matter of law, the facts found support its order revoking the license of Dr. Kincheloe. We affirm it in its entirety and also affirm that part of the Judge's order consonant with this ruling.

Upon the appeal of the Board from the order remanding the cause for hearing *de novo,* we are of the opinion, for the reasons set forth above, that the order was not proper, and it is hereby set aside and reversed.

The cause is remanded to the Superior Court of Wake County for judgment revoking the medical license of Dr. Kincheloe in accordance with this opinion.

As to Respondent's appeal – No Error.
As to Board's appeal – Reversed and Remanded.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1190

FRANKLIN S. KINCHELOE, JR., M.C.,
Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 272 N.C. 116, ... and is reprinted in the Appendix to Petitioner's brief.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 12, 1967. The jurisdiction of this

Court is invoked under 28 U. S. Code, Section 1257(3). The time for Petitioner filing his petition was extended to and including March 2, 1968.

QUESTION PRESENTED

DOES THE PETITION PRESENT ANY QUESTION ARISING UNDER THE CONSTITUTION OF THE UNITED STATES WARRANTING REVIEW BY THIS COURT OF THE DECISION OF THE NORTH CAROLINA SUPREME COURT, WHICH FOUND THAT PETITIONER HAD KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL AT THE HEARING BEFORE RESPONDENT BOARD AND THAT THE BOARD'S DECISION REVOKING PETITIONER'S LICENSE TO PRACTICE MEDICINE WAS IN ACCORD WITH THE APPLICABLE STATUTES OF NORTH CAROLINA?

STATUTORY PROVISIONS INVOLVED

This case involves the application of North Carolina General Statutes, Chapter 90, Article 1, which are quoted in the appendix to the brief, summarized as follows:

> "G. S. 90-14 provides that the Board of Medical Examiners may revoke a physician's license, "when, after due notice and hearing, it shall find (he) . . . has been guilty of . . . any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his

profession. . .". It further provides that its findings and actions shall be subject to review upon appeal to the Superior Court.

G. S. 90-14.10 says that upon the review, the case shall be heard by the judge without a jury, upon the record; that "(t)he court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material and substantial evidence admissible under this article, or are arbitrary or capricious."

G. S. 90-14.11 authorizes any party, including the Board, to appeal to the Supreme Court from the decision of the Superior Court."

STATEMENT OF FACTS

Petitioner in this court was referred to in the opinion of the Supreme Court of North Carolina as Respondent and was referred to in the Order of the Superior Court of North Carolina as "Dr. Kincheloe".

Petitioner seeks a writ of certiorari from this court for a review of the decision of the Supreme Court of North Carolina, which is reprinted in the appendix to Petitioner's brief filed herein, upholding the order of the Respondent Board of Medical Examiners of the State of North Carolina revoking Petitioner's license to practice medicine. This opinion clearly summarizes the rather lengthy record

of the hearing, and completely and sufficiently answers each of petitioner's complaints concerning the hearing. For convenience, we shall repeat and amplify this statement of facts here.

This case was commenced by respondent Board with the issuance and service upon Petitioner of a "Notice of Charges and Accusations", and of a hearing thereon, to be held on January 6, 1967, as set forth in the record of the case in the Supreme Court of North Carolina, a copy of which is filed with this court, pages 1-4, and as provided by the General Statutes of North Carolina regulating the practice of medicine, which are reprinted as an appendix to this brief. The charges against petitioner related to his alleged mistreatment of Deborah Jean Edwards (Stanley), the petitioner's patient, on August 17, 1966. These charges were as follows:

"(a) You directed and caused Deborah Jean Edwards to enter a room in the rear of your offices, excluded her mother from the room, and you entered the room and closed the door.

"(b) You then directed and caused Deborah Jean Edwards to remove all of her clothing in your presence without any medical reason or necessity.

"(c) You examined various parts of the nude body of Deborah Jean Edwards in a room, the door or doors to which were closed, and in which no other person was present.

"(d) You administered to Deborah Jean Edwards a drug by hypodermic injection which rendered her unconscious for an appreciable period of time without any medical reason or necessity.

"(e) While Deborah Jean Edwards was unconscious and insensible to her surroundings and while no other person was present and while she was unclothed you examined, observed, touched and otherwise came in contact with her body, all without medical reason or necessity.

"(f) You attempted to kiss Deborah Jean Edwards.

"(g) You attempted to enduce Deborah Jean Edwards to permit you to embrace her.

"(h) You placed your arms around Deborah Jean Edwards while she was unclothed without any medical cause or necessity.

"(i) You penetrated the vaginal cavity which caused a laceration at the entrance to the vagina of Deborah Jean Edwards without medical reason or necessity and without the presence of any other person.

"(j) By your remarks and actions in your dealings and attendance of Deborah Jean Edwards, you displayed a lustful, lascivious and unprofessional attitude and demeanor, and you did take unprofessional liberties with her.

"(k) You engaged in sexual intercourse with Deborah Jean Edwards.

"2. In your treatment of Deborah Jean Edwards on August 17, 1966 and in connection therewith, you were guilty of unprofessional and dishonorable conduct unworthy of and affectng your profession, and grounds exist for the revocation of your license to practice medicine heretofore issued by this Board."

The notice served upon respondent further provided and included the following:

"You are further given notice that a hearing will be held concerning the above charges and accusations before the Board of Medical Examiners of the State of North Carolina at its meeting to be held at the Mid Pines Hotel, Moore County, N. C. on January 6, 1967 at 2:00 p.m. o'clock at which time you will be permitted to be heard, to cross examine witnesses and to present evidence on your own behalf if you so desire, either personally or through counsel, and that following said hearing the Board will make such findings and take such action as the evidence may warrant and justify, with respect to the suspension or revocation of your license to practice medicine heretofore issued by this Board."

Following a hearing before the respondent Board on January 6, 1966, the Board found Dr. Kincheloe guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession and ordered his license to practice medicine revoked.

The petitioner appealed to the Superior Court of Wake County for a review of the findings and order of the Board, pursuant to the applicable North Carolina statute. When the Petition for Review was first heard in the Superior Court, petitioner moved that the case be remanded to the respondent Board for more specific findings of fact concerning or a dismissal of the specific charges set forth in paragraphs 1-a through 1-k of the Notice of Charges and Accusations. Thereafter, the matter was again considered by the respondent Board upon a review of the entire stenographic record of January 6, 1967, and by unanimous vote of the Board the petitioner was found guilty of each of the charges set forth in paragraphs 1-a through 1-k of the Notice, and the revocation of petitioner's

license to practice was affirmed and reiterated. Petitioner thereupon again appealed the Superior Court to review and reverse the findings and order of the respondent Board, upon substantially the same grounds petitioner had previously set forth in his first appeal.

The cause was again heard in the Superior Court before Honorable Lacy H. Thornburg, Judge Presiding, in Wake County, on the 20th of September, 1967, upon petitioner's appeal.

As provided by the applicable statute set forth in the appendix hereto, the Superior Court hearing was held upon the stenographic record of the evidence presented before the Board, and the additional testimony of the petitioner which he was permitted to give orally before the court, which appears in the record, pages 115-124.

The evidence in support of the charges and accusations introduced at the hearing before the respondent Board on January 6, 1967 was summarized in the opinion of the North Carolina Supreme Court as follows:

> "Summarized, except where quoted the evidence against the respondent before the Board of Medical Examiners tended to show that on 16 August 1966 Mrs. Myrtle Edwards took her sixteen-year-old daughter Deborah Jean Edwards to Dr. Kincheloe's office for an examination and attention. After an hour or so he took Deborah and her mother into his private office where the mother told the doctor that Deborah had been feeling bad, that she though her kidneys were bad and that she wanted the doctor to

check them. Deborah had been struck by a mirror of a truck the day before and had been suffering from a headache since then.

Dr. Kincheloe took Deborah into another room, leaving her mother in his office. He kept her there from about 3:30 p.m. until after 5:00 p.m. When Deborah came out she was holding onto the wall, steadying herself, staggering and was dizzy. Mrs. Edwards and Deborah then went to the home of another daughter, and later Deborah told two older sisters what had occurred while she was with Dr. Kincheloe. The sisters told the mother, and the next morning Deborah was examined by Dr. Leonard S. Woodall who testified that he made a pelvic examination to see if Deborah had had intercourse; that he found sperm and a laceration of the hymenal, and that in his opinion she had had intercourse.

Deborah testified that she had been hit by the mirror of a truck and received a blow on her right temple; that she had some bad headaches that night and the next day, and also that she had been in bed sick for about a week and "mother thought it was my kidneys." Upon being admitted to Dr. Kincheloe's private office, Mrs. Edwards told him that she wanted him to examine Deborah's head because the truck had hit her and to check her kidneys. The child was then taken to another room, and Dr. Kincheloe asked her to go into the bathroom and give him a specimen of her urine, which she did. The doctor told her to put it on the table, and it was still in the same place when she left the room over an hour later.

She then testified as to what further occurred, except for a period of unconsciousness caused by the injection of some drug in her arm. No good purpose would be served by relating the details of the hour-long treatment during which no nurse or other person was present.

She said she was required to completely disrobe, and after a more than complete examination was given an injection that rendered her unconscious. Her evidence offered a substantial base for the findings of the Board which were affirmed by the Court.

She was dizzy and had to hold onto the wall or chair to keep from falling as she left the office. When she got to her sister's house she told her mother that the doctor had given her a shot and she passed out and I was real dizzy and sleepy like I could sleep for three or four days. I was scared you know when I woke up I was real sore and it hurt me when I walked . . . but I was scared to say anything about it so I didn't mention it." The next day she told her sister Virginia about it, and Virginia told another sister, Becky. About an hour later the two sisters came over to Deborah's house, "and I told her about what I thought had happened and then Becky went and told mother she thought I ought to go the hospital and be examined. . . . I was sore in my lower private parts and it hurt me to sit down. As soon as I awoke I was hurting, and sore but I didn't say anything about it to anybody. . . . I was sore all the next day. . . . There was some bleeding from my body that night when I came home. . . . I discovered a small amount in my pants and a lot of discharge."

Deborah testified that she had not engaged in sexual intercourse before the incident in Dr. Kincheloe's office.

Mrs. Rebecca Edwards Wheeler corroborated the testimony of her young sister Deborah, saying that after the other sister Virginia told her about talking with Deborah that she then questioned Deborah, who recounted the details of the experience with Dr. Kincheloe. Her testimony fully corroborated Deborah's testimony.

Mr. Robert D. Emerson, Special Agent of the State Bureau of Investigation, said that after his department had been called into the case, he interviewed Mrs. Myrtle Edwards and Deborah Jean Edwards, and that at the time of the interviews, E. L. Norton, another agent of the S.B.I., and a lady were present. In essence, he said that the statements made to him by Mrs. Edwards and her daughter were the same as contained in her testimony before the Board. He also said that he had investigated the reputations of Mrs. Edwards and Deborah and that they were good."

Dr. Leonard S. Woodall (r.p. 46-49) testified that he had examined Miss Edwards on Friday, August 19th, 1966, and found that she had a laceration in the hymenal ring, that she had two sperm in a specimen from her vagina, that she had had intercourse only within the previous two or three days, but not before that time, that he observed a needle puncture of the skin in her antecubtal fossa inside the elbow of the right arm, which is the usual entrance for a hypodermic injection for inducing sleep.

Petitioner personally appeared before respondent Board for the hearing on January 6, 1967, accompanied by his wife and one George Eason, who he presented as a witness in his behalf, but without counsel. Before going into the hearing Dr. Kincheloe acknowledged that he had received a copy of the charges and accusations preferred against him. At that time the following occurred between the petitioner and Dr. Davis, who was then President of the Board, as appears on page 46(b) of the record as follows:

"MR. ANDERSON: Dr. Kincheloe is present and I would suggest the Board ask him if he is represented by counsel.

DR. DAVIS: Do you have counsel with you, Dr. Kincheloe?

DR. KINCHELOE: No, sir, I do not.

DR. DAVID: You don't desire any representation, then?

DR. KINCHELOE: I don't feel it's necessary, no.

MR. ANDERSON: Dr. Kincheloe made some statement with reference to whether or not he desired to remain in the room during the testimony of witnesses or absent himself. I suggest he be given an opportunity to make a statement regarding that subject at this time.

DR. DAVIS: Would you care to—

DR. KINCHELOE: Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I

frankly do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented their story and my version of what actually happened has not been told.

DR. DAVIS: Well, if it is your preference, then we will excuse you from this part of the proceedings.

DR. KINCHELOE: Thank you very much.

(Dr. Kincheloe is excused)."

During the examination of the witnesses, the Board's attorney made an attempt to locate petitioner for the purpose of offering the witnesses to petitioner for cross examination, but petitioner was not to be found in the building in which the hearing was held. Later petitioner returned to the hearing room and was asked if he desired to examine any or all of the witnesses to which he replied "No sir, this has been done in court previously and I am not an attorney, and I don't feel qualified to cross examine the witnesses. . . . I would like simply to present my story and tell exactly what happened." Petitioner was then sworn and said:

"Gentlemen, I would like to have the privilege of telling my story without interruption if it is all right with you, and if you have any questions when I finish, feel free to ask them. Let me preface my remarks by saying that some 3½ years ago I was before the

Board, at which time I was guilty of something I am quite deeply ashamed of, I was certainly in the wrong and the decision of this Board to revoke my license at that time I feel was entirely justified. I certainly bear no ill feeling against this Board. And had I been on the Board at the time myself I feel that my decision in that particular case would have been the same as yours. You had no choice but to do what you did at that time."

Petitioner then proceeded to testify before the Board without interruption to the effect that he was a changed man and was incapable of doing what he was charged to have done to Deborah Edwards. He testified that he gave Deborah Jean Edwards a complete physical examination, including a pelvic examination, while she was unclothed in the back room of his office to which the door was closed but not locked. He denied unseemly touching the patient or making advances to her or even giving her a shot to put her to sleep. Petitioner was permitted without objection to relate what his lawyer and others had told him about Deborah Jean Edwards' reputation, and to make any other statements he desired to make.

The record of the hearing before the Board includes a verbatim transcript in question and answer of the testimony of petitioner. (R. pp. 78-110). This shows that several members of the Board asked petitioner questions concerning his previous trial by the Board to which he had already referred, and he repeatedly said that the Board did the right thing, that he had no criticism of it and that he would have done the same thing had he been a member of the Board and petitioner admitted that he had not been truthful in regard to the previous charge.

He was then asked about his attempted suicide following the present charge and his treatment at Dorothea Dix Hospital, a mental institution at Raleigh where he stayed for 20 days after his attempted suicide. An explanation of this attempt—he testified that he was depressed about all of the charges, that his wife got in a tantrum and said she was going to leave petitioner and he was depressed enough to think she meant it and that he filled himself as full of phenobarbital as he could, more than a lethal dose and the next thing he knew was when he woke up in the Dorothea Dix Hospital with his wife sitting beside him.

Petitioner presented one witness in his own behalf, George Eason, at the hearing before the Board who testified that Deborah Jean Edwards was "back there, I don't know 40-45 minutes . . . I heard the phone ring several times . . . the girl and her mother looked well when they left the office, seemed to be all right". Mr. Eason admitted upon cross examination that he had a long criminal record for various larcenies, breaking and entering; fighting and public drunkeness.

At the conclusion of the hearing before the Board petitioner made the following statement: "I would like to say to you that I hope you have heard my testimony with an open mind and without prejudice for my previous trouble, and I am sure you have. I can only re-emphasize that I am not the same person that I was at the time I was here before this Board before and this thing that happened to me recently I am not guilty of, any facet of it. I think had you heard the testimony as presented at court that you would have seen through the girl as members of the jury did, and as I said, I have a great deal of respect for

the members of this Board and I feel that you have heard me with an open mind and that you will do the right thing. God bless you".

At the hearing in the Superior Court before Judge Thornburg, petitioner was permitted to testify orally concerning his appearance before the Board without counsel. At this time, petitioner testified as follows:

"Why did you not take a lawyer with you?

A. Frankly, I could not afford the service of a lawyer, as I had borrowed . . ."

Q. How had you financed your case in the Superior Court?

A. I had borrowed on the second mortgage on my house and my household furniture, (R. pp. 116-117)

Q. Now Dr. Kincheloe, the record shows there was some conversation between you and the Board as well as Mr. Anderson concerning you being present when various witnesses testified. What was the reason for that conversation?

A. I had requested that I be excused from this proceeding; their testimony had been presented in the trial and I assumed they would go by that transcript. (R. p. 118)

Q. Did you have any money from any source you could have employed an attorney?

A. Frankly, I did not. (R.p. 119)"

On cross examination before Judge Thornburg petitioner testified as follows:

"CROSS EXAMINATION By Mr. Anderson:

Q. Dr. Kincheloe, you understood the nature of the charges that were preferred against you by the Board of Medical Examiners, did you not?

A. Yes sir.

Q. You received the notice of such charges in, sometime in October of 1966, didn't you?

A. That's true, yes sir.

Q. You recall when you were handed the copy of those charges, do you?

A. Yes sir.

Q. And you remember the incident of somebody handing them to you?

A. Yes sir.

Q. And you read them at that time, didn't you?

A. That's true.

Q. And you were in your right mind and in charge of your mental facilities at that time, weren't you?

A. That's true.

Q. You were not under any disability as far as your mental capacity was concerned at that time, were you?

A. No, sir.

Q. Since that time, after you were at your home, you reviewed the charges, did you not?

A. Yes, sir.

Q. And before the hearing in January, 1967, before the Board of Medical Examiners, you had again reviewed the charges, had you not read them?

A. Yes sir.

Q. And at the time you appeared before the Board you acknowledged that you had received the charges?

A. That's true.

Q. And you understood them at that time, did you not?

A. Yes sir.

Q. And you were in your right mind and in charge of your mental facilities at that time?

A. Yes sir.

Q. And you brought with you there some friend or witness?

A. A witness.

Q. A witness to present?

A. Yes sir.

Q. And your wife was with you at that time?

A. Yes sir.

Q. And you recall that in those, in the notice of the charges you would be permitted to appear in person and be represented by counsel?

A. Yes sir.

Q. You understood that?

A. Yes sir.

Q. And at the time you made the statements that are recorded in the record, you understood that?

A. Yes sir.

Q. And you recall that you were asked to stay and hear the witnesses and that you declined to do so?

A. That's true, yes, sir.

Q. And you did not stay in the lobby of the hotel at which the hearing was held all of the morning?

A. I was either there or in the coffee room.

Q. You did not ask to cross examine any of the witnesses?

A. Mr. Anderson, I didn't feel qualified.

MR. CORBETT: I submit the record is going to show that.

COURT: Overruled, go ahead.

Q. Dr. Kincheloe, how old are you?

A. Forty-six.

Q. You were educated in the usual preliminary fashion before your medical college?

A. Yes sir.

Q. You graduated from college before taking your medical course?

A. I did, sir.

Q. And doctor, you had had connection with lawyers before, have you not?

A. Yes sir.

Q. Many times, haven't you; and employed lawyers, haven't you?

A. Not many times.

Q. How many times have you employed lawyers in connection with charges against you either criminal or before the Board of Medical Examiners?

A. Two or three times to my knowledge.

Q. When you were before the Board in 1952 for narcotic addiction, did you have a lawyer there?

A. I don't recall being before the Board in 1952.

Q. In '53?

A. I was not before the Board for that.

Q. When did you surrender your narcotic license?

A. I gave them up voluntarily in 1952.

Q. At that time did you plead guilty to a charge, criminal charge, so you could be admitted to the hospital, U. S. Government Hospital for treatment of narcotic addiction?

MR. CORBETT: I don't think that is competent on what I have offered concerning what took place in Southern Pines.

A. About fifteen years ago I was a narcotic addict, I went to Lexington, Kentucky, voluntarily; I was not forced to go.

Q. Since that time, you employed counsel in connection with charges preferred against you by the

Board in connection with a matter in 1963, did you not?

A. Yes sir.

Q. You had counsel at the hearing before the Board initially, did you not, from Johnston County at that time?

A. Yes sir.

Q. And then, on appeal to the Superior Court or petition for review of the Board's action involving your license following that hearing you had two lawyers as your counsel?

A. Yes sir.

Q. And you were thoroughly familiar with the procedure followed by the Board at that time, weren't you?

A. I assume I was, yes sir.

Q. And you were in consultation with your lawyer concerning legal matters in connection with the findings of the Board at that time, weren't you?

A. That is true, yes sir.

Q. And in connection with matters you referred to in the Superior Court, you were represented by counsel who now appears for you?

A. That's true.

Q. And thereafter your present counsel was available and living in Smithfield, seven miles from your home, was he not?

A. That's true.

Q. And where he's continued living since that time?
A. That's true.

Q. And you went to the hearing in January before the Board driving your Cadillac automobile, didn't you?
A. 1959 Cadillac automobile, yes sir.

Q. You owned property?
A. That was my wife's automobile, yes, sir, wasn't mine.

Q. You owned property?
A. All mortgaged.

Q. And you were living in your home there at Selma titled in your name and—
A. And my wife's.

Q. You and your wife's, right?
A. That's also heavily mortgaged.

Q. And you have made arrangement for compensating your present counsel in this matter?

MR. CORBETT: Objection.

COURT: Sustained.

MR. ANDERSON: No further questions."

Following this hearing in the Superior Court, Judge Thornburg entered an order which appears in the record (p. 27) in which he found facts and made his conclusions of law, from which we quote the following:

"Upon the foregoing findings of fact the court concludes as a matter of law:

(1) That under the provisions of G.S. 90-14 the Board of Medical Examiners of the State of North Carolina had full authority to revoke the license of Franklin Stith Kincheloe, Jr., to practice medicine in the State of North Carolina upon a finding that he had been guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession.

(2) That any defect in notice of hearing before the Board was waived by Dr. Kincheloe through his personal appearance before the Board at its meeting held on January 6, 1967, at the appointed time and place set forth in the notice of charges and accusations.

(3) That any right to be represented by counsel at the hearing held by the Board was knowingly and intelligently waived by Dr. Kincheloe.

(4) That any right to confrontation by witnesses called at the hearing before the Board was knowingly and intelligently waived by Dr. Kincheloe.

(5) That the trial and acquittal by Dr. Kincheloe of criminal charges arising out of the incident referred to in the notice of the charges and accusations is not res judicata and is not a bar against the proceeding before the Board of Medical Examiners of the State of North Carolina.

(6) That there is sufficient competent evidence in the record to support the finding by the Board that Dr. Kincheloe's license to practice medicine in the State of North Carolina should be revoked.

(7) That there is sufficient finding of fact upon which the Board could base its conclusions that Dr. Kincheloe was guilty of unprofessional and dishonorable conduct.

(8) That a review of the record pursuant to the provisions of GS 90-14.10 leads the undersigned court to the inescapable conclusion, however;

A. That Dr. Kincheloe did not receive a fair and impartial hearing by the Board.

B. That incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision.

C. That the Board at its hearing on this matter did not comply with the mandatory provisions of GS 90-14.6.

IT IS THEREFORE ORDERED that the case be and the same is hereby remanded for hearing de novo before the Board of Medical Examiners of the State of North Carolina in accordance with the provisions of Article 1, Chapter 90 of the General Statutes of the State of North Carolina.

From the foregoing conclusions of law No. 1-7, petitioner appealed to the Supreme Court of North Carolina. From the conclusions set forth in paragraphs 8. (A, B. and C), and from the order remanding the cause to the Board for further hearing, the respondent Board appealed to the Supreme Court of North Carolina.

Upon appeal, the Supreme Court of North Carolina, in a unanimous opinion which is reprinted in its entirety in the Appendix to petitioner's brief, affirmed the findings of Judge Thornburg that the petitioner had knowingly and intelligently waived his right to be represented by counsel in the hearing before respondent Board, saying further: "Even had he not done so, we know of no provision for the appointment at public expense of an attorney for a doctor whose office is so filled with patients that he has to decide whom he will see first."

Concerning the questions asked petitioner by members of the respondent Board, the Supreme Court of North Carolina said:

> "No new evidence was developed and the questions were not of a harsh nature but constituted a repetition of his previous evidence. (pp. A-8, petitioner's appendix)
>
> "An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank'." (p. A-18, petitioner's appendix)

In the North Carolina courts, petitioner complained that he had been interrogated concerning his former appearance before the same Board, his trial upon the charge of rape, and his confinement to a mental institution, all of which subjects he introduced into the hearing by his own statements.

The Supreme Court in its opinion also discussed and considered each and every error assigned by petitioner concerning the admission of evidence and his interrogation by members of the Board, and concluded that the hearing was conducted in full compliance with the rules and the course and practice of the court, after due notice; that the Board's findings were fully sustained by the evidence; and that petitioner's license to practice medicine should be revoked.

ARGUMENT

NO QUESTION ARISING UNDER THE CONSTITUTION OR STATUTES OF THE UNITED STATES IS INVOLVED IN THIS CASE.

This case involves no question arising under the constitution of the United States, as urged by petitioner. The North Carolina Superior Court found as a fact that petitioner had knowingly and intelligently waived his right to be represented by counsel and to confront witnesses at the hearing before the respondent Board and this was affirmed by the Supreme Court. Petitioner based his appeal to the North Carolina Supreme Court upon the contention that he had not intelligently waived his right to counsel at the hearing, conceding that such a right might be waived in such a proceeding in the nature of a civil action.

All other questions involved in the appeal to the North Carolina Supreme Court by respondent Board and petitioner involved alleged errors in the admission of evidence and in the interrogation of petitioner by members of the respondent Board, and whether by reason of such alleged

errors petitioner received a fair and impartial hearing before the Board. All of these contentions and questions were decided against petitioner by a unanimous Supreme Court of North Carolina.

While the main thrust of petitioner's argument here appears to be his lack of counsel at the hearing before the respondent Board, we will respond to all of his miscellaneous contentions set forth throughout his brief concerning alleged errors in the hearing before the respondent Board.

PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO BE REPRESENTED BY COUNSEL AND TO CONFRONT WITNESSES AT THE HEARING BEFORE RESPONDENT BOARD.

The North Carolina Courts found and concluded that petitioner referred to in the Superior Court below as "licensee", and in the Supreme Court as respondent, had knowingly and intelligently waived his right to be represented by counsel and to confront witnesses at the hearing before the Board. Such a right and opportunity was afforded petitioner in accordance with the provisions of the North Carolina statutes regulating the revocation of licenses to practice of medicine.

The finding of the court below that petitioner waived representation by counsel is fully supported by the record and his own testimony, as follows:

The notice of charges and accusations included the following: (R. p. 3)

"You are further given notice that a hearing will be held concerning the above charges and accusations before the Board of Medical Examiners of the State of North Carolina on January 6, 1967 at 2:00 p.m. o'clock at which time you will be permitted to be heard, to cross examine witnesses, and to present evidence on your own behalf, either personally or through counsel." (emphasis supplied)

Petitioner appeared in person at the hearing at the time and place set out in the notice, accompanied by his wife and one George Eason, who testified as petitioner's witness at the hearing. At that time, petitioner acknowledged receipt of a copy of the notice of charges set out in the record (R. p. 46a). Thereafter the following occurred:

"MR. ANDERSON: Dr. Kincheloe is present and I would suggest the Board ask him if he is represented by counsel.

DR. DAVIS: Do you have counsel with you, Dr. Kincheloe?

DR. KINCHELOE: No, sir. I do not.

DR. DAVIS: You don't desire any representation, then?

DR. KINCHELOE: I don't feel it's necessary, no."

In his testimony before the court below, petitioner testified to the following effect:

"That he understood the nature of charges preferred against him, which he reviewed at his home after he received a copy of the charges. (R. p. 119)

That he understood that he would be permitted to be represented by counsel at the hearing before the Board (R. p. 120).

That he had employed lawyers two or three times before in connection with criminal charges or charges before the Board of Medical Examiners, particularly at the hearing before the Board on charges in 1963 and on appeal from the Board to the Superior Court. (R. p. 122).

That he was thoroughly familiar with the procedure followed by the Board at that time. (R. p. 122)

Petitioner is well educated, and had knowledge of and experience with procedures before the Board and in the criminal courts.

Petitioner told the court below that he had not employed counsel to represent him at the hearing before the Board because he could not "afford" to do so. He made no representation to the Board at anytime that he could not afford to employ counsel or that he desired to be represented by counsel. He did indicate to the Board that he had been represented by counsel in the criminal trial on his indictment of raping Deborah Jean Edwards.

The finding and conclusion of the court below that petitioner had waived his right to confront witnesses against him is also fully supported by the record, which shows the following:

That the petitioner understood from the notice of charges that he would be privileged to confront and cross examine witnesses at the hearing before the Board.

That petitioner made the following statement to the Board at the hearing:

> "DR. KINCHELOE: 'Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I frankly do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented their story and my version of what actually happened has not been told." (R. p. 46-b)

That petitioner referred to the "story of the prosecution" indicating that he had observed that Deborah Jean Edwards and her mother and sister, who had testified in the criminal trial, were present at the Board meeting.

With respect to this contention of petitioner, Pless, J., speaking for the Supreme Court of North Carolina, said:

> "It is also implied that some disadvantage resulted to the respondent because he was not represented by counsel at the hearing, saying he could not afford to employ counsel. Also, it must be recalled that he said he didn't think this necessary and that he waived it. Even had he not done so, we know of no provision for the appointment at public expense, of any attorney for a doctor whose office is so filled with patients that he

has to decide whom he will see first. It would strain the credubility of the public to learn that, in these days, there is an indigent doctor!

"No material change in the circumstances of the respondent has been shown, but we note that he is now represented by able (and not court-appointed) counsel."

It is not without significance that petitioner employed able counsel as soon as he was notified of the Board's decision of January 10, 1967, through whom petitioner applied for a stay order on January 27, 1967 (R. p. 7), and has been represented by counsel employed by petitioner since that time. From all of this, it is obvious that petitioner, voluntarily elected not to be represented by counsel at the hearing before the Board, and to rely upon his own ability to presuade and convince the Board, each of whom he knew personally as the result of his several previous appearances before the Board, and being the same individuals who had re-instated his license to practice medicine 18 months previously.

We are not aware of any court decisions applying to civil actions the principles announced by this court as being applicable to representation of a defendant in a trial upon criminal charges. A hearing before the respondent Board of Examiners is in the nature of a civil proceeding. Such proceedings are specifically denominated as "civil actions" in General Statutes 90-14.6, which provides that the Board shall hear evidence in the manner and form as in "civil actions". Also, General Statutes 90-14.11 provides that either party to such a proceeding

before the Board may appeal to the Supreme Court under "rules of procedure applicable to OTHER CIVIL ACTIONS". (Emphasis supplied).

Similar license revocation proceedings are held to be in the nature of civil actions by numerous courts of last resort in their holdings that acquittal of an accused physician upon a criminal charge does not bar proceedings against him before the Board of Medical Examiners, as annotated and discussed in 123 *American Law Reports* at p. 784.

In the Supreme Court of North Carolina, petitioner abandoned his previous contention that his acquittal of the criminal charge of raping Deborah Jean Edwards was a bar to the charges preferred against him by respondent Board. Nevertheless, the North Carolina Court in its opinion included a complete answer to any such contention (p. A-18) in upholding the Superior Court's conclusion that such acquittal was not *res judicata* of the charges herein involved. Such a ruling is fully supported by the numerous decisions cited in the above ALR annotation.

THE OTHER CONTENTIONS OF PETITIONER IN SUPPORT OF HIS PETITION INVOLVE RULINGS OF THE NORTH CAROLINA COURT UPON EVIDENTIARY AND PROCEDURAL MATTERS EXCLUSIVELY WITHIN THE PURVIEW OF THE STATE COURT.

With respect to the general conduct of the hearing before the respondent Board, in the opinion of the North Carolina Supreme Court it is said:

> "Here, a group of eminent doctors of the very highest character and reputation have (and the record shows they did it reluctantly and regretfully) found their associate guilty, upon impressive evidence, of 'lustful, lascivious and unprofessional conduct." The court (below) found that that these findings were supported by the evidence, as was its order that his license to practice medicine be revoked".

The qualification of the members of respondent Board to hear the case has never been questioned by petitioner. The sufficiency of the evidence to support the Board's findings have and were not questioned by petitioner in the Supreme Court of North Carolina.

The opinion of the Supreme Court continues as follows:

"However, the Court also found that Dr. Kincheloe did not receive a fair and impartial hearing in that 'incompetent evidence outside the scope of his notice was heard and most probably considered by the Board.' The finding does not specify this evidence, but upon consideration of the record, we can only construe it as holding improper the questions by the members of the Board regarding the respondent's previous violations, which had resulted in the suspension of his license. This ruling is fallible. (1) The respondent first interjected this feature when he referred to his hearing before the Board three and a half years earlier and said that he was ashamed of the matters then investigated. The admission of incompetent evidence is cured when substantially the same evidence is theretofore or thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, Sec. 48. Thus, if evidence regarding his previous license revocation were incompetent, it had

"theretofore been admitted without objection" in the form of the respondent's voluntary statement. (2) The proceedings show that the previous charges were already known to the members of the Board so that information given in the present investigation added no new knowledge. (3) Examination of a defendant, or respondent, as to past misconduct is competent for the purpose of impeachment and may properly be considered by a jury (or a board) in weighing the value and credibility of his testimony.

"The Doctor was questioned about his previous troubles with the Board, as well as other questionable activities, only after he had referred to them, or it was apparent from the questions that the members of the Board already had knowledge of these activities, and no new material information was thus elicited. While no objection was taken at the time, all of the questions asked were competent and would have been admitted by any court.

"In its judgment, the court found that the prosecution of the respondent upon the charge of rape which resulted in his acquittal was not *res judicata* and was not a bar against these proceedings. This was correct, and yet the learned judge implied that questions regarding that trial were improper. We cannot agree. Other factors must be considered. In a criminal trial, the guilt of a defendant must be shown beyond a reasonable doubt; here only a preponderance of the evidence is required. In the criminal charge, the defendant was alleged to have committed rape —here he was charged with unethical and unprofessional conduct in having sexual relations with his patient—a vast difference. In the criminal prosecution, the penalty upon

conviction is a death sentence or life imprisonment. In these proceedings the maximum punishment is the loss of the respondent's license to practice medicine."

With respect to petitioner's contention that respondent Board did not "admit and hear evidence in the same manner and form as prescribed by law for civil actions", Pless, J., for the Court said:

> "An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank." The only incompetent evidence we find is that the respondent was permitted to violate the hearsay evidence rule and testify to the alleged immoral conduct of Deborah, which he claims was related to him by three different boys."
>
> "In full and complete hearings, of which the respondent had notice, evidence has been submitted to the Board which fully sustains its findings and order as set out in the statement of facts. No reason appears to question the motives and veracity of Deborah Jean Edwards. If, for any reason, she were making a false charge against the doctor, she could have testified that while in a semi-conscious condition and unable to protect herself, the respondent had sexual relations with her. The fact that she did not so testify but that this was discovered only after she had spoken of her soreness to her sisters, followed by the examination by Dr. Woodall, gives credence to the charges. Upon all of the evidence, including that of the respondent, Deborah was in his office for a sufficient length of time

> for the incident to occur as found by the Board. Deborah's testimony is corroborated in many details by the testimony of her mother, her sister, Mr. Anderson of the S.B.I., and Dr. Woodall. In opposition to this, we have only the denial of the respondent and rather vague substantiation of part of his statement by the witness Eason."

Petitioner's contention that he was incapable of answering the charges because of mental illness at the time of the hearing before respondent Board (Petitioner's brief, p. 7) is wholly without merit. Petitioner's counsel raised and made no such contention in either of the North Carolina courts. On the contrary, petitioner has at all times contended he was mentally competent not only to testify, but to practice medicine, at anytime. In fact, petitioner testified in the Superior Court (R. pp.119-121) that he had read the charges against him many times and fully understood them and the notice of hearing, that he was under no mental disability at the time he was served with such charges or at the hearing, that he understood that he would be permitted to be represented by counsel at such hearing, and that he made and understood the statements made by him at such hearing. The Superior Court found as a fact that petitioner "knowingly and intelligently" in his personal appearance waived any defect in service of notice of charges, his right to be represented by counsel and to be confronted with witnesses at such hearing. (R. p. 34), which findings were affirmed by the Supreme Court of North Carolina. At the hearing before respondent, Petitioner intelligently testified and made his plea to the Board, and even explained that his confinement to a mental institution occurred while he was unconscious from an

intentional and self-administered overdose of barbiturate drugs, in sudden depression, rather than for a specific mental illness.

Petitioner also stated that he had requested his attending physician at the State Hospital to send the Board a report of his diagnosis of petitioner's mental condition.

ERRORS IN PETITIONER'S BRIEF

Petitioner's brief in support of his petition contains several inadvertent errors to which we should call attention, as follows:

On page 6, appears the statement, "No transcript of the foregoing cross-examination (of petitioner before the Board) is contained in the record". On the contrary, a full transcript of petitioner's entire testimony before the respondent Board is set forth in pages 78-107 of the record in the Supreme Court of North Carolina, a copy of which has been filed with this court.

On pages 10 and 11 of petitioner's brief appear misquotations of several assignments of error made by the respondent Board in its appeal to the Supreme Court of North Carolina. From petitioner's brief, and his statement that he "concurs in the foregoing Exceptions of the Board numbered 7, 8, 9 and 10" it would appear that respondent had contended that the Board of Examiners agreed that it had committed error in its hearing, which is not correct. On the contrary, the Exceptions and Assignments of Error of the Board 7, 8, 9 and 10 are "for that the court (Superior Court) included in its conclusions of law the

"finding" that Dr. Kincheloe did not receive a fair and impartial hearing", "that incompetent evidence was heard", etc.

CONCLUSION

It is therefore respectfully submitted that Petitioner's license to practice medicine was properly revoked by the Board of Medical Examiners of the State of North Carolina upon plenary competent evidence, after due notice and hearing, and after affording petitioner an opportunity to be represented by counsel and to cross examine witnesses at the hearing before the Board, which he knowingly and intelligently waived, all in accordance with the General Statutes of North Carolina regulating the practice of medicine; that no question involving the denial of due process of law or other federal question is presented by Petitioner warranting a review of the decision of the Supreme Court of North Carolina; and no grounds exist for the issuance of a writ of certiorari in this case.

Respectfully submitted,

s/ JOHN H. ANDERSON, JR.

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APPENDIX

Provisions of the General Statutes of North Carolina concerning the revocation of a license to practice medicine.

The following is a reprint of all the provisions of the General Statutes of North Carolina concerning the authority and procedure for the revocation of a license to practice medicine by the Board of Medical Examiners of the State of North Carolina, as set forth in Chapter 90 of the General Statutes:

ARTICLE 1.

Practice of Medicine.

§ 90-1. North Carolina Medical Society incorporated.—The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605.)

§ 90-2. Board of Examiners.—In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, whch shall consist of seven regularly graduated physicians. (1858-9, c. 258, ss, 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Scss. 1921, c. 44, s. 1.)

§ 90-3. Medical Society appoints Board.—The Medical Society shall have power to appoint the Board of Medical Examiners. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C. S., s. 6607.)

§ 90-14. Board may rescind license.—The Board shall have the power to revoke and rescind any license granted by it, when, after due notice and hearing, it shall find that any physician licensed by it has been guilty of grossly immoral conduct, or of producing or attempting to produce a criminal abortion, or, by false and fraudulent representations, has obtained or attempted to obtain, practice in his profession, or is habitually addicted to the use of morphine, cocaine or other narcotic drugs, or is habitually addicted to the use of marijuana, barbiturates, demerol or any other habit forming drug or derivative of such drug, or has by false and fraudulent representations of his professional skill obtained, or attempted to obtain, money or any thing of value, or has advertised or held himself out under a name other than his own, or has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he holds a license, or is guilty of any fraud or deceit by which he was admitted to practice, or has been guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession, or has been convicted in any court, state or federal, of any felony or other criminal offense involving moral turpitude, or has been adjudicated a mental incompetent or whose mental condition renders him unable safely to practice medicine. Upon the hearing before said Board of any charge involving a conviction of such felony or other criminal offense, a transcript of the record thereof certified by the clerk of the court in which

such conviction is had, shall be sufficient evidence to justify may appeal to the Supreme Court as hereinafter provided in section 90-14.11. (1953, c. 1248, s. 3.)

§ 90-14.2. Hearing before revocation or suspension of a license.—Before the Board shall revoke or rescind any license granted by it to any physician, it will give to the physician a written notice indicating the general nature of the charges, accusation or complaints preferred against him and stating that the licensee will be given an opportunity to be heard concerning such charges or complaints at a time and place stated in such notice, or to be thereafter fixed by the Board, and shall hold a public hearing not less than thirty days from the date of the service of such notice upon such licensee, at which he may appear personally or through counsel, may cross-examine witnesses and present evidence in his own behalf. A physician who is mentally incompetent shall be represented at such hearing and shall be served with notice as herein provided by and through a guardian ad litem appointed by the clerk of the court of the county in which the physician has his residence. Such licensee or physician may, if he desires, file written answers to the charges or complaints preferred against him within thirty days after the service of such notice, which answer shall become a part of the record but shall not constitute evidence in the case. (1953, c. 1248, s. 3.)

§ 90-14.3. Service of notices.—Any notice required by this chapter may be served either personally or by an officer authorized by law to serve process, or by registered mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the Board. If notice is served personally, it shall be deemed

to have been served at the time when the officer delivers the notice to the person addressed. Where notice is served by registered mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to addressee or refusal of the addressee to accept the notice. (1953, c. 1248, s. 3.)

§ 90-14.4. Place of hearings for revocation or suspension of license.—Upon written request of the accused physician, given to the secretary of the Board twenty days after service of the charges or complaints against him, a hearing for the purpose of determining revocation or suspension of his license shall be conducted in the county in which such physician maintains his residence, or at the election of the Board, in any county in which the act or acts complained of occurred. In the absence of such request, the hearing shall be held at a place designated by the Board, or as agreed upon by the physician and the Board. (1953, c. 1248, s. 3.)

§ 90-14.7. Procedure where person fails to request or appear for hearing.—If a person who has requested a hearing does not appear, and no continuance has been granted, the Board or its trial examiner or committee may hear the evidence of such witnesses as may have appeared, and the Board may proceed to consider the matter and dispose of it on the basis of the evidence before it. For good cause, the Board may reopen any case for further hearing. (1953, c. 1248, s. 3.)

§ 90-14.8. Appeal from Board's decision revoking or suspending a license.—A physician whose license is revoked or suspended by the Board may obtain a review of

the decision of the Board in the Superior Court of Wake County or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State, upon filing with the secretary of the Board a written notice of appeal within twenty days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within thirty days after the receipt of a notice of appeal as herein provided, either by an applicant or a licensee, the Board shall prepare, certify and file with the clerk of the superior court in the county to which the appeal is directed the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3.)

§ 90-14.9. Appeal bond; stay of Board order.—The person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of $200 at the same time the notice of appeal is filed with the Board. At any time before or during the review proceeding the aggrieved person may apply to the reviewing court for an order staying the operation of the Board decision pending the outcome of the review, which the court may grant or deny in its discretion. (1953, c. 1248, s. 3.)

§ 90-14.10. Scope of review.—Upon the review of the Board's decision revoking or suspending a license, the case

shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this article, or are arbitrary or capricious. At any time after the notice of appeal has been filed, the court may remand the case to the Board for the hearing of any additional evidence which is material and is not cumulative and which could not reasonably have been presented at the hearing before the Board. (1953, c. 1248, s. 3.)

§ 90-14.11. Appeal to Supreme Court; appeal bond.—Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court under rules of procedure applicable in other civil cases. No appeal bond shall be required of the Board. The appealing party may apply to the superior court for a stay of that court's decision or a stay of the Board's decision, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court. (1953, c. 1248, s. 3.)

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1190

FRANKLIN S. KINCHELOE, JR., M.D.,
Petitioner,

v.

BOARD OF MEDICAL EXAMINERS OF THE
STATE OF NORTH CAROLINA,
Respondent.

ANSWER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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The Court should set aside the decision to revoke petitioner's license because the hearing upon which such decision was based was not conducted in accordance with Par. 90.14 of the General Statutes. The Board permitted each member of the Board and their attorney to question petitioner, who

was then in the hands of seven prosecutors besides the Board's attorney, with no one present to see that he had a fair and impartial hearing.

Paragraph 90-14.6 of the General Statutes provides

> "*Evidence admissible.* – In proceedings held pursuant to this article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions."

The procedure followed, as mentioned above, was contrary to Rule 4 of the Rules of Practice in the Superior Court which required that the cross-examination of each witness be conducted by one counsel. The interrogation of Dr. Kincheloe by the several members of the Board and the Board's counsel was detrimental to petitioner, prejudiced his case, was unlawful and precluded by Par. 90-14.6 of the General Statutes. This was certainly not in accordance with the same manner and form prescribed by law in civil actions as required by #90-14.6 of the General Statutes of North Carolina.

The foregoing provisions of the Statute and Rules of Practice were not followed here, which shows the illegality of the hearing and justifies granting this petition for certiorari.

Petitioner withdraws the last five paragraphs of page 10 of the Petition for a Writ of Certiorari and the first paragraph on page 11 of its petition and substitutes the following therefor:

The petitioner concurs with conclusions of law (R. 34-35) numbered 8 by Judge Thornberg which is as follows:

> 8. "That a review of the record pursuant to the provisions of GS 90-14.10 leads the undersigned court to the inescapable (R. 34) conclusion, however;
>
> A. (R. 35) That Dr. Kincheloe did not receive a fair and impartial hearing by the Board.

B. That incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision.

C. That the Board at its hearing on this matter did not comply with the mandatory provisions of GS 90-14.6."

Respectfully submitted,

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Washington, D.C. 20006
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Answer, postage prepaid, to J. H. Anderson, Attorney for the Board of Medical Examiners for the State of North Carolina, 806 Wachovia Bank Building, Raleigh, North Carolina, this 18th day of April, 1968.

WARREN E. MILLER